84-385

No.

Office - Supreme Court, U.S.
FILED
SEP 11 1984
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

HONDA MOTOR CO., LTD.,
Petitioner,

v.

WALTER P. COONS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

JOHN I. LISOWSKI *
PAUL A. LISOVICZ
MORGAN, MELHUISH, MONAGHAN,
ARVIDSON, ABRUTYN & LISOWSKI
651 W. Mount Pleasant Avenue
Livingston, New Jersey 07039
(201) 994-2500

Counsel for Petitioner
Honda Motor Co., Ltd.

* Counsel of Record

September 11, 1984

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

34pp

QUESTIONS PRESENTED

Following remand of this case by this Court two years ago "for further consideration in light of *G.D. Searle & Co.* v. *Cohn* [455 U.S. 404 (1982)]," the New Jersey Supreme Court ruled in *Coons I* that the New Jersey statute which tolls state statutes of limitation against non-New Jersey corporations (N.J. Stat. Ann. § 2A:14-22 (West 1952)) violates the Commerce Clause of the United States Constitution, and that its decision would be retroactive. On rehearing, however, the New Jersey Supreme Court in *Coons II* reversed itself and chose to apply New Jersey retroactivity law to make its decision in *Coons I* wholly prospective. The Court's decision bars petitioner Honda Motor Co., Ltd. and other non-New Jersey corporations from raising a statute of limitations defense *in any action currently pending in New Jersey, in any action for personal injury filed in New Jersey prior to August 3, 1985*, and *in any action for property damage or breach of contract filed in the state prior to August 3, 1989*. New Jersey corporations, on the other hand, are and will be able to raise a limitations defense in any pending or future action, regardless of when the action was filed. The questions presented are as follows:

(1) Whether a state supreme court, in conflict with numerous precedents of this Court and of other state courts of last resort, may apply state law to determine whether its decision holding a state statute invalid on federal constitutional grounds should be retroactively applied.

(2) Whether the New Jersey Supreme Court, by its decision in *Coons II* to make *Coons I* wholly prospective, has created a new and independent violation of the Commerce Clause of the United States Constitution.

(3) Whether a state supreme court may apply prospectively a decision holding a state statute invalid on federal

constitutional grounds when the state court admits that the decision did not constitute a "clear break" with past law, when there could be neither justifiable nor actual reliance on the state statute in question, when prospectivity severely undermines the constitutional interests at stake, and when the equities favor retroactivity.

(4) Whether a state supreme court may refuse to apply a decision holding a state statute invalid on federal constitutional grounds to the defendant and *amici* who litigated the constitutionality of the statute for several years, because the defendant and *amici* are "institutional litigants."

PARTIES BELOW

Parties to this case in the court below are those listed in the caption of this petition, and the Attorney General of New Jersey, who was granted leave to intervene by the Appellate Division of the New Jersey Superior Court on August 3, 1982. Honda Motor Co., Ltd., and American Honda Motor Co., Inc. are together the sole owners of Honda of America Manufacturing, Inc. Honda Motor Co., Ltd. has no parent companies, affiliates or other subsidiaries (except wholly owned subsidiaries).

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES BELOW	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISION AND STATUTE INVOLVED	3
STATEMENT OF THE CASE	3
A. Introduction	3
B. Background	5
C. *Coons I*	7
D. *Coons II*	7
REASONS FOR GRANTING THE WRIT	10
I. The New Jersey Supreme Court's Reliance on State Law To Decide the Retroactivity of *Coons I* Conflicts with Numerous Precedents of This Court and of Other State Courts of Last Resort, and, If Left Uncorrected, Would Provide a Means for State Courts To Circumvent Totally Enforcement of Federal Constitutional Rights	10
II. By Its Prospectivity Holding in *Coons II*, the New Jersey Supreme Court Has Created a New and Independent Violation of the Commerce Clause, in Direct Conflict with a Long Line of Decisions by This Court Which the New Jersey Supreme Court Recognized as Controlling in *Coons I*	12

TABLE OF CONTENTS—Continued

Page

III. Even if This Court's Balancing Test Should Have Governed the Retroactivity of *Coons I*, the New Jersey Supreme Court Disregarded That Test's Threshold "Clear Break" Requirement and Otherwise Misapplied This Court's Balancing Test 18

IV. The New Jersey Supreme Court's Characterization of Honda and Its Supporting *Amici* as "Institutional Litigants" Is Insufficient Under Federal Law To Deny Them the Benefits of *Coons I* 25

CONCLUSION 27

Appendices (separately bound)

TABLE OF AUTHORITIES

Cases: Page

Adams v. *Illinois*, 405 U.S. 278 (1972) 11
Allenberg Cotton Co. v. *Pittman*, 419 U.S. 20 (1974) 6, 13, 25
Brown v. *Louisiana*, 447 U.S. 323 (1980) 10, 11, 23
Burch v. *Louisiana*, 441 U.S. 130 (1979) 11
Chapman v. *California*, 386 U.S. 18 (1967) 10
Chevron Oil Co. v. *Huson*, 404 U.S. 97 (1971) ..... *passim*
Cohn v. *G.D. Searle & Co.*, 447 F. Supp. 903 (D. N.J. 1978) 21
Commonwealth v. *Hilbert*, 476 Pa. 288, 382 A.2d 724 (1978) 11
Commonwealth v. *Stokes*, 374 Mass. 583, 374 N.E.2d 87 (1978) 11
Coons v. *Honda Motor Co., Ltd.*, 176 N.J. Super. 575, 424 A.2d 446 (App. Div. 1980) 2
Coons v. *American Honda Motor Co., Inc.*, 94 N.J. 307, 463 A.2d 921 (1983) ..... *passim*
Coons v. *American Honda Motor Co., Inc.*, 96 N.J. 419, 476 A.2d 763 (1984) ..... *passim*
Dahnke-Walker Milling Co. v. *Bondurant*, 257 U.S. 282 (1921) 13
Desist v. *United States*, 394 U.S. 244 (1969) 23
Epperson v. *Arkansas*, 393 U.S. 97 (1968) 15
G.D. Searle & Co. v. *Cohn*, 455 U.S. 404 (1982) ..... *passim*
Great Northern Railway Co. v. *Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932) 16
Hankerson v. *North Carolina*, 432 U.S. 233 (1977) 11, 16
Hopkins v. *Kelsey-Hayes, Inc.*, No. 78-1646 (D.N.J., filed June 21, 1984) 7
Honda Motor Co., Ltd. v. *Coons*, 455 U.S. 996 (1982) 4, 6
International Textbook Co. v. *Pigg*, 217 U.S. 91 (1910) 13
Ivan V. v. *City of New York*, 407 U.S. 203 (1972) 11, 16
Kelsey-Hayes, Inc. v. *Hopkins*, 455 U.S. 985 (1982) 7
Kelsey-Hayes, Inc. v. *Hopkins*, 677 F.2d 301 (3d Cir. 1982) 7
Lemon v. *Kurtzman*, 411 U.S. 192 (1973) 14, 16, 18

TABLE OF AUTHORITIES—Continued

	Page
Linkletter v. *Walker*, 381 U.S. 618 (1965)	15, 19
Loving v. *Virginia*, 388 U.S. 1 (1967)	15
Mack v. *Oklahoma*, 459 U.S. 900 (1982)	20
Macri v. *Flaherty*, 115 F. Supp. 739 (E.D.S.C. 1953)	17
Maren Engineering Corp. v. *Velmohos*, 455 U.S. 985 (1982)	7, 21
Mead Corp. v. *Allendale Mutual Insurance Co.*, 465 F .Supp. 355 (N.D. Ohio 1979)	17
Michigan v. *Payne*, 412 U.S. 47 (1973)	11, 15
Mullaney v. *Wilbur*, 421 U.S. 684 (1975)	11
New York v. *Cathedral Academy*, 434 U.S. 125 (1977)	14, 16, 18
North Carolina v. *Pearce*, 395 U.S. 711 (1969)	11, 15
People v. *Burnick*, 14 Cal.3d 306, 535 P.2d 352 (1975)	11
People v. *Patterson*, 39 N.Y.2d 288, 347 N.E.2d 898 (1976), *aff'd*, 432 U.S. 197 (1977)	11
Rodrigue v. *Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969)	25
Sioux Remedy Co. v. *Cope*, 235 U.S. 197 (1914)	13
Solem v. *Stumes*, 52 U.S.L.W. 4307 (U.S., February 29, 1984)	20
State v. *Bernard*, 391 So.2d 1180 (La. 1980)	11
Stovall v. *Denno*, 388 U.S. 293 (1967)	25
United States v. *Johnson*, 457 U.S. 537 (1982)	19, 20, 21
United States v. *Kubrick*, 444 U.S. 111 (1979)	24
United States v. *Peltier*, 422 U.S. 531 (1975)	25
United States v. *U.S. Coin & Currency*, 401 U.S. 715 (1971)	*passim*
Vaughn v. *Dietz*, 430 S.W.2d 487 (Tex. 1968)	17
Veazie v. *Moor*, 55 U.S. 568 (1852)	13
Velmohos v. *Maren Engineering Corp.*, 83 N.J. 282, 416 A.2d 372 (1980)	21

Constitution, Statutes and Rule:

U.S. CONST. art. I, § 8, cl. 3	3, 13
28 U.S.C. § 1257(3) (1982)	2
N.J. Stat. Ann. § 2A:14-1 (West Supp. 1984)	8

TABLE OF AUTHORITIES—Continued

Page

N.J. Stat. Ann. § 2A:14-2 (West 1952) 8
N.J. Stat. Ann. § 2A:14-22 (West 1952) ..... i, 3
Rules of the Supreme Court, Rule 21 (k) 2

Other Authorities:

Corr, *Retroactivity: A Study in Supreme Court Doctrine "As Applied"*, 61 N.C.L. Rev. 745 (1983) 23
L. Tribe, *American Constitutional Law* (1978) ..12, 13, 24

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No.

HONDA MOTOR CO., LTD.,
Petitioner,

v.

WALTER P. COONS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

Petitioner Honda Motor Co., Ltd. respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of New Jersey in this case.[1]

---

[1] Honda gratefully acknowledges the aid of attorneys for Brinco Mining Limited—through its national counsel, Shea & Gardner, of Washington, D.C.—in the preparation of this petition. Brinco, a Canadian asbestos mining company, has had a longstanding interest in the issues raised here due to the potential effect on hundreds of cases currently pending against Brinco in New Jersey and in other states with similar tolling statutes. Brinco submitted an *amicus* brief to this Court in the related case of *G.D. Searle & Co.* v. *Cohn*, 455 U.S. 404 (1982), and submitted *amicus* briefs and participated in oral argument on the merits in both *Coons I* and *Coons II*.

OPINIONS BELOW

The opinion of the New Jersey Supreme Court on the retroactivity issue (*Coons II*) (App. 1a-27a) is reported at 96 N.J. 419, 476 A.2d 763 (1984).[2] The prior opinion of the New Jersey Supreme Court declaring the New Jersey tolling statute unconstitutional on Commerce Clause grounds (*Coons I*) (App. 28a-54a) is reported at 94 N.J. 307, 463 A.2d 921 (1983). One decision of the Appellate Division of the New Jersey Superior Court (App. 55a-64a) is reported at 176 N.J. Super. 575, 424 A.2d 446 (1980), and another decision of the Appellate Division (App. 65a-68a) is not reported. The two opinions of the trial court (App. 69a-72a) are not reported.

JURISDICTION

The judgment of the New Jersey Supreme Court in *Coons II* (App. 1a-27a) was rendered on June 13, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3) (1982).[3]

---

[2] Citations to "App." refer to the separate appendix that accompanies this certiorari petition pursuant to Rule 21(k) of this Court.

[3] The federal questions presented here—whether federal law should have controlled the retroactivity of *Coons I* and whether *Coons II* reached the correct result under federal law—were first raised in the briefs and oral argument preceding *Coons II*, after the New Jersey Supreme Court had decided to reconsider its earlier retroactivity ruling in *Coons I*. The New Jersey Supreme Court explicitly rejected the claim that federal law should govern the retroactivity of *Coons I*, ruling in *Coons II* that *Coons I* would be prospective "as a matter of state law." (App. 4a.)

The federal constitutional issue presented here—whether the decision in *Coons II* to make *Coons I* prospective is an independent violation of the Commerce Clause—was also first raised in the briefs and oral argument preceding *Coons II*. By its decision in *Coons II* that *Coons I* should be prospective, the New Jersey Supreme Court necessarily rejected the claim that making *Coons I* prospective would be an independent violation of the Commerce Clause.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

United States Constitution art. I, § 8, cl. 3:

> "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, ..."

New Jersey Statutes Annotated, § 2A:14-22 (West 1952):

> "If any person against whom there is any of the causes of action specified in sections 2A:14-1 to 2A:14-5 and 2A:14-8, or if any surety against whom there is a cause of action specified in any of the sections of article 2 of this chapter, is not a resident of this state when such cause of action accrues, or removes from this state after the accrual thereof and before the expiration of the times limited in said sections, or if any corporation or corporate surety not organized under the laws of this state, against whom there is such a cause of action, is not represented in this state by any person or officer upon whom summons or other original process may be served, when such cause of action accrues or at any time before the expiration of the times so limited, the time or times during which such person or surety is not residing within this state or such corporation or corporate surety is not so represented within this state shall not be computed as part of the periods of time within which such an action is required to be commenced by the section. The person entitled to any such action may commence the same after the accrual of the cause therefor, within the period of time limited therefor, within the period of time limited therefor by said section, exclusive of such time or times of nonresidence or nonrepresentation."

STATEMENT OF THE CASE

A. *Introduction.* This case, which involves the constitutionality of N.J. Stat. Ann. § 2A:14-22 (West 1952) (the New Jersey "tolling" statute), is before this Court

for the second time. Over two years ago, while an appeal in this case was pending, this Court decided *G.D. Searle & Co.* v. *Cohn*, 455 U.S. 404 (1982), which also involved a constitutional challenge to the New Jersey tolling statute. The tolling statute suspends certain New Jersey statutes of limitation against corporations neither incorporated nor registered to do business in New Jersey. In *Searle*, this Court ruled that the tolling statute did not violate the Equal Protection Clause, but that a remand was necessary for consideration by the lower court of the tolling statute's validity under the Commerce Clause. *Id.* at 408-14. Following the remand in *Searle*, this Court vacated the judgment in this case, and remanded it "for further consideration in light of *G.D. Searle & Co.* v. *Cohn* . . . ." 455 U.S. 996 (1982). The decision challenged here is a direct result of that remand, and, as explained at pp. 6-7 & n.5, *infra*, this case has become, in effect, the vehicle for litigating the issues left open by this Court in its remand of *Searle* itself.

The New Jersey Supreme Court subsequently ruled that the New Jersey tolling statute violates the Commerce Clause and provided for a wholly retrospective application of its decision (*Coons I*). (App. 28a-54a.) On rehearing, however, the New Jersey Supreme Court, applying state law, reversed itself and made its invalidation of the tolling statute wholly prospective (*Coons II*). (App. 1a-27a.) The effect of the "prospectivity" ordered by the New Jersey Supreme Court in *Coons II* is that the defendant in this case, Honda Motor Co., Ltd., and other non-New Jersey corporations, engaged solely in interstate commerce in New Jersey and amenable to suit there, are not able to raise a statute of limitations defense in any action currently pending in New Jersey. Moreover, such corporations will not be able to raise a limitations defense in any personal injury action filed in New Jersey prior to August 3, 1985, or in any contract or property damage action filed in the state prior to August 3, 1989.

New Jersey corporations, on the other hand, are and will be able to raise a limitations defense in any pending or future action, regardless of when the action was filed. The record before the New Jersey Supreme Court in *Coons II* indicated that the prospective application of *Coons I* ordered in *Coons II* would mean that hundreds of now pending or yet to be filed New Jersey cases—which would otherwise be barred on statute of limitations grounds—would be allowed to proceed solely against non-New Jersey corporations.[4] It is this "prospectivity" ruling which is challenged here.

B. *Background.* Respondent Coons commenced this suit in 1978 for personal injuries and other losses resulting from a motorcycle accident in 1974. (App. 4a.) Named as defendants in the suit were two corporations—American Honda Motor Co., Inc. ("American Honda"), a California corporation which sells motorcycles in the United States and which is registered to do business in New Jersey, and Honda Motor Co., Ltd. ("Honda"), a Japanese corporation which manufactures motorcycles in Japan and which is not registered to do business in New Jersey. (App. 4a.) American Honda was granted summary judgment on statute of limitations grounds following the trial court's determination that respondent Coons' claim had accrued more than two years before he filed suit

---

[4] The importance of *Coons I* and *Coons II* to pending and future cases filed in New Jersey is illustrated both by the fact that the New Jersey Supreme Court certified *Coons I* on its own motion after the remand by this Court (App. 73a), and by the high participation by nonparties in both *Coons I* and *Coons II*. The Attorney General of New Jersey intervened in *Coons I* to defend the constitutionality of the statute, and filed briefs and participated in oral argument on the merits in both *Coons I* and *Coons II*. Four different *amici* submitted briefs in *Coons I* and seven *amici* submitted briefs in *Coons II*. One *amicus* participated in oral argument on the merits in *Coons I* and three *amici* participated in the argument in *Coons II*.

(App. 67a); this dismissal of American Honda was affirmed by the Appellate Division of the New Jersey Superior Court. (App. 65a-68a.) Honda, however, was not similarly granted summary judgment for the reason that, under the tolling statute, Honda was precluded from raising a statute of limitations defense to Coons' claim because it was not "represented" in New Jersey within the limitations period. (App. 5a.) The Appellate Division sustained this denial of summary judgment to Honda, ruling that the tolling statute applied to Honda and was constitutional (App. 55a-64a), and the New Jersey Supreme Court refused to hear a further appeal. (App. 31a.) Honda then filed an appeal to this Court.

While Honda's appeal was pending, this Court decided *G.D. Searle & Co.* v. *Cohn*, 455 U.S. 404 (1982), holding, over the dissent of Justice Stevens, that New Jersey's tolling statute did not violate the Equal Protection Clause. *Id.* at 408-12. This Court also ruled, however, that *Searle* should be remanded to the lower court for consideration of the tolling statute's precise meaning under New Jersey law and its constitutionality under the Commerce Clause. *Id.* at 412-14.

Justice Powell, joined by Chief Justice Burger, dissented to the remand on the grounds that the Commerce Clause issue was properly before this Court and that there was no ambiguity in the tolling statute. 455 U.S. at 414-19. Justice Powell also noted that the argument that the tolling statute was unconstitutional under the Commerce Clause had "considerable force," 455 U.S. at 419-20, citing *Allenberg Cotton Co.* v. *Pittman*, 419 U.S. 20 (1974).

Following the decision in *Searle*, this case was similarly remanded for resolution of the Commerce Clause issue, 455 U.S. 996 (1982), and since has become the vehicle for litigating the issues left open by this Court in its

remand in *Searle*.[5] Indeed, the importance of *Coons* to *Searle* is shown by the fact that the parties in *Searle* briefed and, in one instance, participated in oral argument, as *amici* in *Coons I* and *Coons II*.

C. *Coons I*. Soon after this case returned to the Appellate Division, the New Jersey Supreme Court certified the case on its own motion. (App. 73a.) On August 3, 1983, the New Jersey Supreme Court, by a 4-3 vote, struck down the New Jersey tolling statute on Commerce Clause grounds. The court ruled first that the tolling statute requires that corporations not incorporated in New Jersey register to do business in the state in order to gain the benefit of the state statutes of limitation. (App. 29a-30a.) The New Jersey Supreme Court went on to hold that, under a long line of decisions of this Court, this "forced-licensure" provision violates the Commerce Clause. (App. 38a-40a.) The New Jersey court also ruled that its decision that the tolling statute was unconstitutional would be retroactive; thus, the decision "[would] apply to all matters that have not reached final judgment." (App. 40a.)

D. *Coons II*. Last January, however, the New Jersey Supreme Court granted rehearing of *Coons I*, limited to the retroactivity question. (App. 4a.) On June 13, 1984, the New Jersey Supreme Court, by a 4-3 vote, reversed its earlier retroactivity decision and held, "as a matter of state law," that "*Coons I* is to be made effective as of

---

[5] *Searle* and its companion case, *Kelsey-Hayes, Inc.* v. *Hopkins*, 455 U.S. 985 (1982), were remanded to the United States Court of Appeals for the Third Circuit, which in turn sent the cases back to the federal district court. 677 F.2d 301, 302 (3d Cir. 1982). Following that remand, both *Searle* and *Kelsey-Hayes* were stayed by the federal district court pending decision by the New Jersey Supreme Court in *Coons*. On June 21, 1984, Judge Brotman, in a two page opinion, applied *Coons II* in the *Kelsey-Hayes* case, ruling that the defendant there could not raise the statute of limitations. *Hopkins* v. *Kelsey-Hayes, Inc.*, No. 78-1646 (D.N.J., filed June 21, 1984). Another case remanded by this Court following its decision in *Coons, Maren Engineering Corp.* v. *Velmohos*, 455 U.S. 985 (1982), was settled by the parties shortly after the remand.

August 3, 1983—that is, the statute of limitations as to foreign, unrepresented corporations commences to run as of that date." (App. 4a, 19a.)[6] The New Jersey court also determined that its prospectivity ruling in *Coons II* would be applied "across the board," that is, that the benefits of the decision in *Coons I* would be denied to everyone, including Honda and various *amici* who participated in *Coons I*. There was "no injustice" in this result, according to the New Jersey majority, since Honda and the *amici* are "institutional litigants," *i.e.*, "of a class that will in the future frequently have resort to the statute of limitations, unimpeded by so much of [the tolling statute] as deprived them of that benefit." (App. 18a.)

Coons II thus effectively denies Honda and supporting *amici* the fruits of their labors. As noted above, *Coons II* allows suits to proceed against Honda and other non-New Jersey corporations for years in the future, solely on the basis of a statute which has been conclusively deemed a violation of the Commerce Clause.

In her dissent, Justice Garibaldi stated first that, regardless of the court's conclusion on retroactivity, the benefits of *Coons I* should be extended to Honda and the corporate *amici* as a matter of "fundamental fairness." "When a statute's unfair and discriminatory features render it offensive to the supreme law of our land, it is just to resolve the matter so that challenging litigants be spared further constitutional deprivation. Only in this fashion may the unconstitutional burden which has heretofore been placed upon them be eradicated." (App. 23a.)

---

[6] The statute of limitations period for personal injury actions in New Jersey is two years, N.J. Stat. Ann. § 2A:14-2 (West 1952); for contract and property damage actions, the limitations period is six years. N.J. Stat. Ann. § 2A:14-1 (West Supp. 1984). While the New Jersey Supreme Court did not spell out the ramifications of *Coons II*, the quoted language appears to mean that non-New Jersey corporations will not have a statute of limitations defense in personal injury actions filed prior to August 3, 1985, or in property damage or contract actions filed prior to August 3, 1989.

Instead, the result of the majority's ruling is that until August 3, 1985—two years from *Coons I*—"plaintiffs who have sat on their rights will be able to institute actions against these parties and impose additional unconstitutional burdens upon them." (App. 23a.) Justice Garibaldi found the majority's observation that Honda and the *amici* were "institutional litigants" "insufficient to carry the day." "All litigants should be treated equally before the courts." (App. 23a.) Moreover, denying Honda and the corporate *amici* the benefits of the ruling in *Coons I* they secured destroys incentives for litigants to challenge unconstitutional statutes: "We need private attorneys to push forward the frontiers of the law, but we will not have them if they stand to gain nothing through their efforts." (App. 20a.) On this point—that *Coons I* should be applied to Honda and the corporate *amici*—Justice Garibaldi was joined in dissent by Justices Schreiber and Pollock. (App. 27a.)

Justice Garibaldi went on to argue that *Coons I* should be given "complete retroactive effect." (App. 23a.) Prospectivity, she reasoned, "frustrates" the purpose of the decision, since it "countenances the very unconstitutionality that we sought to abrogate in *Coons I*." (App. 25a.) When a law is held unconstitutional, "only extraordinarily strong policy reasons"—not present in this case—can justify prospectivity. (App. 25a.) Moreover, the record in the case shows that Mr. Coons and various *amici* supporting his position "did not place any reliance whatsoever upon the tolling statute;" in past decisions, some "actual reliance" has been needed to justify prospectivity. (App. 25a-26a.) To apply *Coons I* prospectively, Justice Garibaldi observed, "does nothing to advance the equities of this case since . . . the parties did not rely on the old rule," but "does delay the effect of the new rule, and thereby retards its purpose." (App. 26a.) She concluded with this assessment of the majority's motivation: "New Jersey cannot afford to create inconsistent decisions based on this Court's desire to give a certain

class of plaintiffs a remedy to which they are not entitled." (App. 26a-27a.)

REASONS FOR GRANTING THE WRIT

I. The New Jersey Supreme Court's Reliance on State Law To Decide the Retroactivity of *Coons I* Conflicts with Numerous Precedents of This Court and of Other State Courts of Last Resort, and, If Left Uncorrected, Would Provide a Means for State Courts To Circumvent Totally Enforcement of Federal Constitutional Rights.

In *Coons II*, the New Jersey Supreme Court chose to make *Coons I* prospective "as a matter of state law." (App. 4a.) This holding conflicts with numerous precedents of this Court and of other state courts of last resort and, if allowed to stand, it would provide a means for state courts, through application of state retroactivity law, to undermine entirely enforcement of federal constitutional rights. Indeed, as shown below (pp. 12-18), the application of state retroactivity law in *Coons II* has had just this result, since through its prospectivity ruling in *Coons II*, the New Jersey Supreme Court has created a new and independent violation of the Commerce Clause.

The precedents of this Court dictate that federal law must govern the application and enforcement by states of federal constitutional rights. *E.g.*, *Chapman* v. *California*, 386 U.S. 18, 21 (1967) (determination of whether violation of a criminal defendant's federal constitutional rights in state court was harmless error must be governed by a federal—rather than a state—harmless error standard). In the retroactivity area, this Court has frequently reviewed state court decisions on the retroactivity of new federal constitutional protections for criminal defendants, thus implicitly holding that federal law must control. *E.g.*, *Brown* v. *Louisiana*, 447 U.S. 323, 326-27 (1980) (reversing decision of Louisiana Supreme Court that decision holding nonunanimous juries for nonpetty

offenses unconstitutional should be applied only to juries empaneled after the date of the decision); *Michigan* v. *Payne*, 412 U.S. 47, 57 (1973) (reversing decision of Michigan Supreme Court applying *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), retroactively).[7]

So too, state courts have repeatedly acknowledged that federal precedents control the retroactivity of federal constitutional decisions. *E.g.*, *People* v. *Burnick*, 14 Cal.3d 306, 535 P.2d 352, 369 (1975) (under U.S. Supreme Court retroactivity principles, decision that Fourteenth Amendment requires proof beyond reasonable doubt in mentally disordered sex offender proceedings must be retroactively applied); *State* v. *Bernard*, 391 So.2d 1180, 1181 (La. 1980) (in *Brown* v. *Louisiana*, *supra*, U.S. Supreme Court ordered retroactive application of decision in *Burch* v. *Louisiana*, 441 U.S. 130 (1979), prohibiting nonunanimous six-member jury verdicts; hence 5-1 verdict returned against defendant in a pre-*Burch* trial must be reversed); *Commonwealth* v. *Stokes*, 374 Mass. 583, 374 N.E.2d 87, 91-92 (1978) (decision in *Hankerson* v. *North Carolina*, 432 U.S. 233 (1977), making retroactive decision concerning constitutional requirements for jury charge on self-defense in *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975), requires reversal of defendant's pre-*Mullaney* conviction); *People* v. *Patterson*, 39 N.Y.2d 288, 347 N.E.2d 898, 903 (1976), *aff'd*, 432 U.S. 197 (1977) (U.S. Supreme Court retroactivity precedents mandate retroactive application of federal constitutional rule set forth in *Mullaney* v. *Wilbur*, *supra*); *Commonwealth* v. *Hilbert*, 476 Pa. 288, 382 A.2d 724, 727-28 (1978) (U.S. Supreme Court's decision in *Hankerson* v. *North Carolina*, *supra*, which mandates retroactive application of *Mullaney* v. *Wilbur*, *supra*, requires reversal of defendant's pre-*Mullaney* conviction).

---

[7] Other cases where this Court has reviewed state court decisions on the retroactivity of federal constitutional protections include *Hankerson* v. *North Carolina*, 432 U.S. 233 (1977); *Ivan V.* v. *City of New York*, 407 U.S. 203 (1972); *Adams* v. *Illinois*, 405 U.S. 278 (1972).

Thus, if allowed to stand, the New Jersey Supreme Court's decision to rest its prospectivity holding in *Coons II* on state law conflicts both with numerous precedents of this Court and of other state courts of last resort. Moreover, as *Coons II* well illustrates, the New Jersey Supreme Court's holding on this point provides a method for state courts to circumvent totally enforcement of federal constitutional rights; it would allow a state court, in its own complete and unreviewable discretion, to make a decision of this Court concerning a federal constitutional right ineffective for years after the date of the decision "as a matter of state law," thus negating the federal constitutional right and insulating its decision from this Court's review. This is an unacceptable result in a system where the federal courts are meant to be the ultimate protectors of federal constitutional rights. This role of the federal courts is especially important where, as here, the Commerce Clause is concerned, since one of the main purposes of that clause is to protect against "state action which imposes special or distinct burdens on out-of-state interests unrepresented in the state's political process." L. Tribe, *American Constitutional Law* § 6-5, at 326 (1978).

II. By Its Prospectivity Holding in *Coons II*, the New Jersey Supreme Court Has Created a New and Independent Violation of the Commerce Clause, in Direct Conflict with a Long Line of Decisions by This Court Which the New Jersey Supreme Court Recognized as Controlling in *Coons I*.

Under the New Jersey Supreme Court's prospectivity holding in *Coons II*, petitioner Honda and other non-New Jersey corporations, engaged solely in interstate commerce in New Jersey, cannot assert a statute of limitations defense in any action currently pending in New Jersey, and will not be able to raise a limitations defense in future actions filed in New Jersey for some two to six years. New Jersey corporations, on the other hand, are

and will be able to assert a statute of limitations defense in any appropriate action, regardless of when that action was filed. As Justice Powell acknowledged in his dissent in *Searle*, 455 U.S. at 419-20, and as the New Jersey Supreme Court recognized in *Coons I* (App. 38a), under a long line of decisions of this Court, it is a *per se* violation of the Commerce Clause for a state to deny benefits of its judicial system (such as a statute of limitations defense) to a foreign corporation, engaged solely in interstate commerce in the state, simply on the ground that the foreign corporation has not obtained a license to do business there. *E.g.*, *Allenberg Cotton Co.* v. *Pittman*, 419 U.S. 20, 33-34 (1974); *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U.S. 282, 291 (1921); *Sioux Remedy Co.* v. *Cope*, 235 U.S. 197, 204-05 (1914); *International Textbook Co.* v. *Pigg*, 217 U.S. 91, 111 (1910).[8] New Jersey's prospectivity decision in *Coons II* therefore creates a new and independent violation of the Commerce Clause.[9]

---

[8] The cited cases involved state statutes held invalid because they improperly regulated interstate commerce, *i.e.*, "Commerce . . . among the several States." U.S. CONST. art. I, § 8, cl. 3. To the extent New Jersey's tolling statute impacts on corporations such as Honda and *amicus* Brinco—whose products make their way to New Jersey from Japan and Canada respectively—the tolling statute may invoive regulation by New Jersey of foreign commerce, *i.e.*, "Commerce with foreign Nations." U.S. CONST. art. I, § 8, cl. 3. *Veazie* v. *Moor*, 55 U.S. 568, 573 (1852). Significantly, state regulation of foreign commerce is more stringently scrutinized than state regulation of interstate commerce: "If state action touching foreign commerce is to be allowed, it must be shown not to affect national concerns to any significant degree, a far more difficult task than in the case of interstate commerce." L. Tribe, *American Constitutional Law* § 6-20, at 370 (1978).

[9] Thus, even if the New Jersey Supreme Court were correct that state law could govern the retroactivity of a federal constitutional decision (App. 4a), the application of state law retroactivity principles in this case has created an independent violation of the Commerce Clause—a separate federal question.

The fact that this Commerce Clause violation has been created by the New Jersey Supreme Court under the guise of holding "prospective" its decision that the tolling statute is unconstitutional does not eliminate the Commerce Clause violation. This Court has allowed decisions holding state laws unconstitutional to be applied prospectively only when prospectivity would not undermine the constitutional interests at stake. In *Lemon* v. *Kurtzman*, 411 U.S. 192 (1973) (*Lemon II*), for example, this Court affirmed a federal court order allowing limited reimbursement of religious schools for expenses incurred pursuant to a state statute struck down on First Amendment grounds only after concluding that the reimbursement "[would] not substantially undermine the constitutional interests at stake in *Lemon I*" and would present only a "remote possibility of constitutional harm." 411 U.S. at 201-03. In contrast, in *New York* v. *Cathedral Academy*, 434 U.S. 125 (1977), this Court struck down on constitutional grounds an attempt by New York to reimburse religious schools for expenses incurred during the school year prior to a decision holding the statute authorizing the expense payments unconstitutional. *Id.* at 133. This Court recognized that, unlike *Lemon II*—where the constitutional harm had already occurred and where prospectivity would not cause new constitutional violations—to allow the reimbursement program in *Cathedral Academy* would mean that a constitutional violation would continue to occur each time a reimbursement payment to a religious school was made. *Id.* at 131-33. For this reason, even the limited reimbursement program attempted by New York "amount[ed] to a new and independently significant infringement of the First and Fourteenth Amendments," and was thus impermissible. *Id.* at 131-34.

Similarly, in *United States* v. *U.S. Coin & Currency*, 401 U.S. 715 (1971), this Court concluded that a decision that the Fifth Amendment precluded criminal conviction of gamblers who refused to file certain incrimina-

tory registration statements must be retroactively applied. This Court reasoned that "a rule of complete retroactivity" followed from the fact that the conduct in question "cannot constitutionally be punished in the first instance," 401 U.S. at 723-24; anything less than complete retroactivity would mean that constitutionally protected conduct could continue to be penalized, and would thus severely undermine the constitutional interests at stake. As Justice Brennan pointed out in his concurrence in *U.S. Coin*, prospectivity in the circumstances of that case would lead to the offensive result that "Virginia might keep in jail interracial married couples whose only offense was cohabitation within the State, so long as the cohabitation was prior to *Loving* v. *Virginia*, 388 U.S. 1 (1967); or that Arkansas could still discharge school teachers who taught evolution before we struck down the relevant statute in *Epperson* v. *Arkansas*, 393 U.S. 97 (1968)." 401 U.S. at 728.[10]

---

[10] *U.S. Coin* did not apply the balancing test often used by this Court in cases such as *Linkletter* v. *Walker*, 381 U.S. 618 (1965), to decide if new constitutional rules of criminal procedure should be retroactively applied. See also *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 105-09 (1971) (applying *Linkletter* balancing test to determine retroactivity of a federal statutory decision). *U.S. Coin* distinguished cases such as *Linkletter*—where the balancing test resulted in prospective application of the new rule—on the ground that such cases were "concerned [only] with the implementation of a procedural rule which does not undermine the basic accuracy of the fact-finding process at trial," and not, as in *U.S. Coin*, with "the kind of conduct that cannot constitutionally be punished in the first instance." 401 U.S. at 723. In other words, *U.S. Coin*'s rationale for distinguishing cases such as *Linkletter* was that, in those cases, prospectivity did not undermine constitutional interests or cause constitutionally protected conduct to be punished. See also *Michigan* v. *Payne*, 412 U.S. 47, 54 (1973) (*North Carolina* v. *Pearce*, 395 U.S. 711 (1969), should not be applied retroactively because decision only expanded "protective umbrella" for constitutional right; "foundational" right existed before decision and remains protected). *U.S. Coin* also pointed out that in any case where retroactive application of a new constitutional rule of criminal procedure

The New Jersey Supreme Court's prospectivity holding in *Coons II* thus conflicts with this Court's holdings in *Lemon II*, *Cathedral Academy*, and *U.S. Coin*. *Coons I* held that the Commerce Clause did not permit New Jersey to deny its state statute of limitations to foreign corporations engaged in interstate commerce in New Jersey, solely on the ground that these corporations were not registered to do business in New Jersey. *Coons I* held, in the terminology of *U.S. Coin*, that the failure of these foreign corporations to register to do business in New Jersey "cannot constitutionally be punished." Under *Coons II*, not only will this unconstitutional discrimination against and unconstitutional punishment of non-New Jersey corporations continue in the present suit, but the unconstitutional discrimination and punishment will continue in every suit now pending in New Jersey, and in future suits filed in the state for the next two to six years. Surely, allowing New Jersey to continue to punish and discriminate against non-New Jersey corporations on such a massive scale amounts to "a new and independently significant infringement" of the Commerce Clause.[11]

---

would raise substantial doubts about the defendant's guilt, and thus about the state's right to punish him, *U.S. Coin*'s "rule of complete retroactivity" has applied. 401 U.S. at 723-24. *E.g.*, *Ivan V.* v. *City of New York*, *supra*, 407 U.S. at 204-05; *Hankerson* v. *North Carolina*, *supra*, 432 U.S. at 243-44.

[11] The conclusion that the prospectivity decision in *Coons II* amounts to a new violation of the Commerce Clause is not contradicted by the often-quoted statement from *Great Northern Ry. Co.* v. *Sunburst Oil & Ref. Co.*, 287 U.S. 358, 364 (1932), that "the federal constitution has no voice upon the subject" of retroactivity. In *Sunburst*, this Court held that Montana could make a decision concerning state law prospective without violating the Due Process Clause. 287 U.S. at 363-66. *Sunburst* did not hold, however, that a court may make a constitutional decision prospective in any way it chooses without regard to constitutional concerns. This point was recognized by this Court in *Lemon II*, when it noted: "*Sunburst* does not, of course, suggest that we may ignore constitutional interests in deciding whether to attach retrospective effect to a constitutional decision of this Court." 411 U.S. at 200 n.2.

The continuing unconstitutional burdens on and punishment of non-New Jersey corporations created by *Coons II* are substantial. As noted above, not only in this case, but in hundreds of others, non-New Jersey corporations will be forced to defend suits that New Jersey corporations will not. For example, *amicus* Brinco alone indicated to the New Jersey Supreme Court that over six hundred suits are currently pending against it in New Jersey and that many more suits will probably be filed. A significant number of these suits would be barred under New Jersey's two year statute of limitations for personal injury actions.[12] Under the New Jersey Supreme Court's decision in *Coons II*, however, Brinco will be forced to defend these suits, while its co-defendant New Jersey corporations will be dismissed on statute of limitations grounds. Simply for exercising their constitutionally protected right not to register to do business in New Jersey, therefore, Honda, Brinco and other non-New Jersey corporations will be forced to defend and potentially pay judgments in suits in New Jersey for years. Given the hundreds of cases involved, this issue will undoubtedly come before this Court again.

Furthermore, the impact of *Coons I* and *Coons II* may not be limited to cases filed in New Jersey; several other states appear to have tolling statutes similar to New Jersey's, and courts in those states may look to *Coons I* and *Coons II* on both the Commerce Clause and prospectivity issues. *E.g.*, *Mead Corp.* v. *Allendale Mutual Insurance Co.*, 465 F. Supp. 355, 360-62 (N.D. Ohio 1979); *Vaughn* v. *Dietz*, 430 S.W.2d 487, 488-90 (Tex. 1968); *Macri* v. *Flaherty*, 115 F. Supp. 739, 743-44 (E.D.S.C. 1953). The obvious unconstitutionality and substantial burdens created by the New Jersey Supreme Court's prospectivity

---

[12] Indeed, Brinco currently has pending motions for summary judgment on statute of limitations grounds in sixty of the approximately eighty claims pending against it in one group of federal court cases. These claims pending against Brinco in federal court are essentially identical to hundreds of the claims pending against it in New Jersey state courts.

decision in *Coons II* thus merit this Court's attention to the New Jersey tolling statute once again.

III. Even If This Court's Balancing Test Should Have Governed the Retroactivity of *Coons I*, the New Jersey Supreme Court Disregarded That Test's Threshold "Clear Break" Requirement and Otherwise Misapplied This Court's Balancing Test.

Even though the New Jersey Supreme Court improperly applied New Jersey retroactivity law in *Coons II*, it tried to reconcile New Jersey standards for civil retroactivity with the balancing standard set forth in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971). (App. 8a-9a.) We have shown above that because the prospectivity ordered in *Coons II* severely undermines the constitutional interests at stake and subjects constitutionally protected conduct to punishment, this Court's decisions in *Lemon II*, *Cathedral Academy*, and *U.S. Coin* mandate that "a rule of complete retroactivity"—rather than a balancing test of the sort set forth in *Chevron*—must control. (See pp. 12-18 & n.10, *supra*.) But even if the *Chevron* balancing standard did govern, correct application of *Chevron* would also lead to the conclusion that *Coons I* should be retroactive. Indeed, the result in *Coons II* is such a misapplication of *Chevron* that it is clear that the New Jersey Supreme Court did not in truth seek to apply *Chevron* in *Coons II*, but instead applied its own state retroactivity law to circumvent entirely the federal constitutional right it recognized in *Coons I*.

Chevron identified three considerations in making a decision prospective: (1) "[T]he decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed;" (2) a court must "weigh the merits and demerits in each case by looking to the prior history of the

rule in question, its purpose and effect and whether retrospective operation will further or retard its operation;" and (3) a court must "weigh[] the inequity imposed by retroactive application." 404 U.S. at 106-07, quoting *Linkletter* v. *Walker*, 381 U.S. 618, 629 (1965) and other cases. Three terms ago, in *United States* v. *Johnson*, 457 U.S. 537 (1982), a decision in which retroactivity principles were "rethought," *id.* at 548, this Court explained that the initial *Chevron* test sought to determine whether a decision was a "clear break" with past law, and that this "clear break" test was a "threshold" requirement for holding a civil decision prospective. 457 U.S. at 550 n.12. See also *id.* at 563 ("Finally, all questions of civil retroactivity continue to be governed by the standard enunciated in *Chevron Oil Co.* v. *Huson*, 404 U.S. at 106-07. *See n. 12, supra.*") (Emphasis added.)[13] *Johnson* went on to explain that the "clear break" test this Court referred to in its discussion of *Chevron* is met only when a decision "[1] explicitly overrules a past precedent of [the court]; or [2] disapproves a practice [the court] arguably has sanctioned in prior cases; or [3] overturns a longstanding and widespread practice to which [the court] has not spoken, but which a near-unanimous body of lower court authority has expressly approved." *United States* v. *Johnson*, *supra*, 457 U.S. at 551.

In *Coons II*, the New Jersey Supreme Court openly admitted that *Coons I* did not satisfy the *Chevron-Johnson* "clear break" threshold test for prospectivity; it conceded that "the law concerning the effect of the tolling statute on unlicensed foreign corporations was, at best, uncertain at the time plaintiff and the claimant-*amici* started suit," and that *Coons I* "did not literally alter precedent . . . ."

---

[13] The reference to footnote 12 in this statement concerning *Chevron* is significant because it was in footnote 12 of *Johnson* (457 U.S. at 550 n.12) that this Court explained that the initial *Chevron* test embodied a "threshold" "clear break" requirement for holding a civil decision prospective.

(App. 15a-16a.) By the New Jersey Supreme Court's own admission, then, *Coons I* failed to meet the *Chevron-Johnson* "clear break" threshold requirement for prospectivity, and, for this reason alone, should have been held retroactive.[14]

Even assuming, however, that the first criterion of *Chevron* is just a factor to be considered and not a "threshold" test for prospectivity, or that the first criterion does not necessarily embody the "clear break" standard of *Johnson*, *Coons I* does not satisfy the first criterion of *Chevron*. As the New Jersey Supreme Court admitted, *Coons I* "did not literally alter precedent." (App. 16a.) *Coons I* also did not, in the words of *Chevron*, decide "an issue of first impression whose resolution was not clearly foreshadowed." The fundamental point is that the first *Chevron* criterion attempts to measure justifiable reliance, and there could have been no justifiable reliance by respondent Coons or by other New Jersey plaintiffs on the tolling statute. In fact, by the time re-

---

[14] Last term, in *Solem* v. *Stumes*, 52 U.S.L.W. 4307 (U.S., February 29, 1984), a case involving the retroactivity of a new Fifth Amendment criminal law decision, this Court seemed to curtail severely the scope of *Johnson*, stating, without explanation, that *Johnson's* application of the "clear break" test did not control in *Stumes* because the retroactivity question in *Stumes* "is controlled by prior precedent, arises on collateral review, and does not involve the Fourth Amendment." 52 U.S.L.W. at 4308 n.3. This apparent curtailment of *Johnson* in *Stumes* was severely criticized by the three *Stumes* dissenters, 52 U.S.L.W. at 4315 (Stevens, J., joined by Brennan, J., and Marshall, J., dissenting), and was not the first time members of this Court have disagreed over the scope of *Johnson*. *E.g.*, *Mack* v. *Oklahoma*, 459 U.S. 900 (1982) (O'Connor, J., joined by Rehnquist, J., dissenting to decision to remand case to state court for reconsideration in light of *Johnson;* dissenters argue that *Johnson* is inapplicable because *Mack* involved Fifth, not Fourth, Amendment, and that a remand would only confuse lower courts). An additional reason for granting certiorari in this case is thus to clear up this evident disagreement over *Johnson*'s applicability to cases which do not involve the Fourth Amendment.

spondent Coons filed his suit against Honda, the New Jersey tolling statute had already been declared unconstitutional in *Cohn* v. *G. D. Searle & Co.*, 447 F. Supp. 903 (D.N.J. 1978). Moreover, until *Velmohos* v. *Maren Engineering Corp.*, 83 N.J. 282, 416 A.2d 372 (1980), *vacated and remanded*, 455 U.S. 985 (1982), there was a reasonable chance that New Jersey would interpret its tolling statute in line with the vast majority of states to suspend the limitations period only against foreign corporations not amenable to suit.[15] Thus, until *Velmohos*, a New Jersey plaintiff could not justifiably rely on the tolling statute to protect his claim against a foreign corporation amenable to personal jurisdiction in New Jersey. And, after *Velmohos*, it was foreshadowed that the tolling statute required registration, and that this registration requirement violated the Commerce Clause.[16] Thus, again, there could be no justifiable reliance on the tolling statute. For these reasons, then, *Coons I* fails to satisfy the first *Chevron* criterion for prospectivity—even without the restatement of this criterion in *Johnson*.

---

[15] By 1978—the year respondent Coons filed suit—38 of the 42 states that had considered the issue had construed their tolling statutes not to suspend the limitations period against parties amenable to personal jurisdiction in the state. See *Cohn* v. *G. D. Searle & Co.*, 447 F. Supp. 903, 912 n.21 (D.N.J. 1978).

[16] As Justice Powell recognized in *Searle*, 455 U.S. at 416-19, New Jersey law provides no method short of registration for a foreign corporation to designate an agent. Moreover, the New Jersey Secretary of State, in a letter submitted to this Court in *Searle*, confirmed that a foreign corporation could only designate an agent through registration. *Id.* at 419. Indeed, the dissenters in *Coons I* acknowledged that the resolution of the statutory issue in *Coons I*, *i.e.*, that the tolling statute requires registration, was so definitely foreshadowed that it would be unfair to apply any other interpretation of the statute to the parties in *Coons I*. (App. 49a-50a.) The irony is that, given this position of the *Coons I* dissenters, Honda would have been better off had the dissenters prevailed in *Coons I*.

Furthermore, not only was there no "justifiable" reliance on the tolling statute by New Jersey plaintiffs, there was, as Justice Garibaldi observed (App. 25a), not even "actual" reliance on the statute in this case. Respondent Coons sued both American Honda and Honda at the same time—clear evidence that he did not postpone his suit against the unregistered corporation in reliance on the tolling statute. Indeed, Mr. Coons' counsel admitted at oral argument in *Coons II* that his client had filed suit just a few months after first realizing that he might have a claim and consulting with counsel, and that neither Mr. Coons nor his counsel postponed suit in reliance on the tolling statute.[17] Similarly, *amicus* Karl Asch, counsel for plaintiffs in many of the asbestos suits pending against *amicus* Brinco, admitted at oral argument that he filed suit for his clients as soon as he was contacted by them, and that he did not postpone filing in reliance on the tolling statute.[18] And, like respondent Coons, Mr. Asch's clients sued both New Jersey and non-New Jersey corporations at the same time, again evidencing a total lack of reliance on the tolling statute.

The New Jersey Supreme Court's only response to this clear evidence that there was neither justifiable nor actual reliance on the tolling statute by New Jersey plaintiffs was that a "presumption" of reliance was in

---

[17] At the oral argument, respondent Coons' counsel, Mr. Jaffe, admitted that Mr. Coons first thought about filing a suit to recover from his motorcycle accident when he received a recall notice from American Honda in July 1978, and that Mr. Coons thereafter filed suit "as quickly as possible" on October 30, 1978. (App. 75a.) His claim was already barred by that time, however, because, under New Jersey's "discovery" rule, the two year limitations period on Mr. Coons' claim had commenced at the time of his accident in 1974. (App. 67a.)

[18] In response to a question from Chief Justice Wilentz, Mr. Asch stated: "We did in fact effect service [on the foreign corporations] once we were contacted in the case, your Honor." (App. 76a.)

order.[19] In the face of evidence that neither justifiable nor actual reliance had occurred, however, the New Jersey Supreme Court was obliged to do more than to "presume" reliance to satisfy the first criterion of *Chevron*. At issue here is whether an unconstitutional statute may continue in effect for some period to protect reliance interests. If not even actual—let alone justifiable—reliance occurred, there is absolutely no rationale for prospectivity. For a discussion of this point, see Corr, *Retroactivity: A Study in Supreme Court Doctrine "As Applied,"* 61 N.C.L. Rev. 745, 773 (1983) (federal courts have treated evidence of actual reliance as "fundamental" to prospectivity).

The second factor highlighted in *Chevron*—the purpose and effect of the rule in question—again favors retroactivity. The purpose of *Coons I* was to end the discrimination against and burdens on non-New Jersey corporations created by the tolling statute. Under *Coons II*, this discrimination against and punishment of non-New Jersey corporations will continue in every suit now pending in New Jersey, and in future suits filed for the next two to six years, entirely thwarting the purpose of *Coons I*.[20]

---

[19] The New Jersey Supreme Court stated that actual reliance would be "difficult" to measure, and that the failure of foreign corporations to register was some evidence "that participants in the events before us ordered their affairs in accordance with the tolling statute." (App. 17a.) If, however, foreign corporations had indeed "ordered their affairs in accordance with the tolling statute," the logical step would have been for them to register to do business in New Jersey and thus to secure the statute of limitations defense.

[20] The retroactivity opinions of this Court in the criminal procedure area, from which the principles of *Chevron* were derived, have stressed that the purpose to be served by the rule in question must be the "foremost" consideration in any retroactivity analysis, and that the other considerations should only control when the purpose of the rule "[does] not clearly favor retroactivity or prospectivity." *Desist* v. *United States*, 394 U.S. 244, 249, 251 (1969); *Brown* v. *Louisiana*, 447 U.S. 323, 328 (1980). But even without elevating

Turning to equitable considerations, prospectivity is again not justified. Making *Coons I* retroactive will bar some claims on statute of limitations grounds. But the New Jersey legislature has already determined that it is fair to have a statute of limitations; retroactive application of *Coons I* simply makes that statute of limitations equally available to both non-New Jersey and New Jersey corporations. If it were equitable for American Honda to be dismissed from this case on statute of limitations grounds, it is equally fair for Honda to be dismissed. This Court has acknowledged that statutes of limitation serve equitable interests.[21] Thus, the only "equitable" interest protected by *Coons II* is the interest of New Jersey plaintiffs in pursuing stale claims against non-New Jersey corporations after those plaintiffs' claims against New Jersey corporations have expired. It is the precise purpose of the Commerce Clause to protect against this sort of parochial advancement of in-state interests against out-of-staters. L. Tribe, *American Constitutional Law, supra*, § 6-5, at 326.

In sum, even correct application of the *Chevron* balancing factors should have led the New Jersey Supreme Court to the conclusion that *Coons I* should be retroactive. *Coons I* satisfies none of the *Chevron* criteria for prospectivity. *Coons I* did not constitute a "clear break" with past law, there could be neither actual nor justifiable reliance on the tolling statute, prospectivity severely undermines the constitutional interests at stake, and the equitable considerations favor retroactivity.

---

the "purpose" consideration to this level, the prospectivity ordered in *Coons II* so undermines the purpose of *Coons I* that it cannot be sustained.

[21] *United States* v. *Kubrick*, 444 U.S. 111, 117 (1979) ("Statutes of limitations . . . represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.") (Citation omitted.)

IV. The New Jersey Supreme Court's Characterization of Honda and Its Supporting *Amici* as "Institutional Litigants" Is Insufficient Under Federal Law To Deny Them the Benefits of *Coons I*.

In *Coons II*, the New Jersey Supreme Court decided that Honda and the corporate *amici* who supported its position should be denied the benefits of *Coons I* on the grounds that they are "institutional litigants," *i.e.*, "of a class that will in the future frequently have resort to the statute of limitations . . . ." (App. 18a.) This is inconsistent with federal law. With a very few exceptions, this Court has always applied even otherwise wholly prospective decisions to the parties who established the new rule. *E.g.*, *Stovall* v. *Denno*, 388 U.S. 293, 301 (1967); *United States* v. *Peltier*, 422 U.S. 531, 542 n.12 (1975) (where it has been determined that new decision is not to be retroactively applied, "it has not been questioned" that new rule applies to parties in case establishing it); *id.* at 548 n.6 (Brennan, J., dissenting) ("Of course, we have always given the benefit of a criminal procedure decision to the defendant in whose case the principle was announced."). This principle is not limited to criminal, or even constitutional, decisions. The new federal statutory rule applied prospectively in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971), was applied to the parties who established it. *Rodrigue* v. *Aetna Casualty & Surety Co.*, 395 U.S. 352, 366 (1969). So too, the Commerce Clause decisions in *Allenberg Cotton Co.* v. *Pittman*, 419 U.S. 20 (1974), and similar cases were applied to the parties before the Court.

The primary reason for this principle of federal law—that the parties who establish a new rule are entitled to benefit from it—is to provide an incentive and reward to those who challenge invalid statutes and doctrines. *Stovall* v. *Denno*, *supra*, 388 U.S. at 301. In this case, Honda has litigated the constitutionality of the tolling statute for over six years—before the Appellate Division

of the New Jersey Superior Court, before this Court, and twice before the New Jersey Supreme Court. When this Court remanded this case to the New Jersey courts for consideration of the statutory and Commerce Clause issues, Honda—through four briefs and two oral arguments—helped answer those questions. These efforts should be rewarded. Similarly, the corporate *amici* who supported Honda were instrumental in *Coons I* and *Coons II*, as the New Jersey Supreme Court acknowledged.[22] They, too, deserve to be rewarded for their efforts. That Honda and the corporate *amici* are, in the words of the New Jersey Supreme Court, "institutional litigants," and thus may at some future time have occasion to raise a statute of limitations defense in New Jersey, is insufficient under federal law to deny them all benefits of *Coons I* until that time.

---

[22] In addition to Brinco Mining Limited, *amici* supporting Honda before the New Jersey Supreme Court included G.D. Searle & Co. and Kelsey-Hayes Company. Brinco's longstanding interest in the issues raised here is set forth in n.1, *supra*. Searle and Kelsey-Hayes were parties in cases before this Court (see n.5, *supra*). Searle submitted *amicus* briefs in *Coons I* and *Coons II* and participated in oral argument on the merits in *Coons II*; Kelsey-Hayes submitted an *amicus* brief in *Coons II*. The majority in *Coons II* recognized that Searle and Kelsey-Hayes "originated" the Commerce Clause argument adopted in *Coons I*, and that Brinco "with great tenacity and persistence [has] espoused the cause." (App. 18a.) Justice Garibaldi came to the same conclusion in her dissent. (App. 22a.) ("The *amici* likewise have engaged in an extraordinarily protracted and tenacious pursuit of this issue . . . .")

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN I. LISOWSKI *
PAUL A. LISOVICZ
MORGAN, MELHUISH, MONAGHAN,
ARVIDSON, ABRUTYN & LISOWSKI
651 W. Mount Pleasant Avenue
Livingston, New Jersey 07039
(201) 994-2500

Counsel for Petitioner
Honda Motor Co., Ltd.

* Counsel of Record

September 11, 1984